DOCUMENT RESUME

ED 410 833 HE 030 407

AUTHOR	Heffernan, Elizabeth B.; Bazluke, Francine T.
TITLE	Minority-Targeted Admissions and Financial Aid Programs. NACUA Publication Series.
INSTITUTION	National Association of Coll. and Univ. Attorneys, Washington, DC.
PUB DATE	1996-06-00
NOTE	29p.
AVAILABLE FROM	National Association of College and University Attorneys, One Dupont Circle, N.W., Suite 620, Washington, DC 20036; phone: 202-833-8390; fax: 202-296-8379 ($10.50).
PUB TYPE	Guides - Non-Classroom (055) -- Reports - Descriptive (141)
EDRS PRICE	EDRS Price MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS	*Affirmative Action; *College Admission; *Compliance (Legal); Court Litigation; Diversity (Student); Foreign Countries; Government School Relationship; Higher Education; Legal Problems; *Minority Groups; *Quotas; Racial Discrimination; Racial Factors; Student Financial Aid

ABSTRACT

This pamphlet discusses the legal considerations affecting the use of voluntary, race-conscious measures in college and university admissions and financial aid programs. It is designed to assist colleges and universities in assessing the legal risks associated with the operation of such programs generally, and in recognizing those program design features that present a heightened or diminished risk in light of judicial precedent and federal agency guidelines. While most minority groups have made gains in higher education (HE) in terms of degree attainment, faculty and administrative employment, the courts are increasingly scrutinizing the laws governing affirmative action programs. With the proliferation of voluntary affirmative action programs, schools have frequently been targeted for private litigation and governmental agency review (specifically by the Office of Civil Rights of the U.S. Department of Education). The courts have narrowed the governing principles for the pursuit of affirmative action by HE to two primary objectives: to remedy past discrimination and to increase diversity. When instituting minority-targeting programs, institutions should carefully consider several factors including: possible use of race-neutral policies that could reach the same objective; the specific minority group/s benefitting from a given policy; possible consideration of more than race to reduce legal risks; avoidance of a strict quota system; flexibility of program administration; impact on non-minority students; and the expected duration of the program. (Contains 29 references.) (DM)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED 410 833

NACUA

THE PUBLICATION SERIES

Minority-Targeted Admissions and Financial Aid Programs

ELIZABETH B. HEFFERNAN
FRANCINE T. BAZLUKE

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

☑ This document has been reproduced as received from the person or organization originating it.

☐ Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

PERMISSION TO REPRODUCE AND DISSEMINATE THIS MATERIAL IN OTHER THAN PAPER COPY HAS BEEN GRANTED BY

NACUA

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

National Association of College and University Attorneys

BEST COPY AVAILABLE

Elizabeth Heffernan is a partner at Hogan & Hartson, L.L.P., in Washington, D.C., specializing in education matters. This pamphlet is drawn in part from materials prepared for a presentation by her colleague Martin Michaelson at a 1996 NACUA workshop, "Affirmative Action after *Adarand*." Daniel Kohrman, Diane Patrick, and Lori-Christina Webb of Hogan & Hartson, L.L.P., contributed to the preparation of those materials.

Francine Bazluke is General Counsel of the University of Vermont (UVM). This pamphlet is drawn in part from her presentation at the Fifth Annual UVM Legal Issues Conference held in Burlington, Vermont in October 1995.
NACUA thanks the UVM Division of Continuing Education for its consent to the publication of these materials.

This is one of a series of publications from NACUA, an organization of colleges and universities joined together for mutual assistance in identifying and resolving legal problems.

The views expressed herein are to be attributed to the authors and not to the National Association of College and University Attorneys. The information appearing in this publication is presented for information purposes only and should not be considered legal advice or be used as such. For a specific legal opinion, readers should confer with their own legal counsel.

June 1996

© 1996 National Association of College and University Attorneys

Printed in the United States of America

Minority-Targeted Admissions and Financial Aid Programs

This publication discusses legal considerations affecting the use of voluntary, race-conscious measures in college and university admissions and financial aid programs.[1] Given the recent legal challenges to affirmative action programs and the still unresolved ramifications of the U.S. Supreme Court's decision in *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995), this pamphlet is designed to assist colleges and universities in assessing the legal risks associated with the operation of such programs generally, and in recognizing those program design features that present a heightened or diminished risk in light of judicial precedent and federal agency guidelines.

THE ROLE OF MINORITY-TARGETED ADMISSIONS AND FINANCIAL AID PROGRAMS

Race-conscious admissions decisions and financial aid targeted to minority students have been among the tools used by institutions of higher education to encourage minority enrollment over the past several decades. Based on its ongoing research concerning the status of minorities in higher education, the American Council on Education recently concluded:

> During the past two decades, white women and persons of color have experienced enrollment gains, increased undergraduate and graduate degree attainment, and gains in faculty and administrative employment. However, until recently, African American, Hispanic, and American Indian progress for both women and men has been sporadic at best. It has been only during the past four to five years that data on college enrollment, degrees conferred, and employment have revealed steady progress among all three of these ethnic minority groups.

ACE cautioned that these gains could "evaporate" if colleges and universities should lose the ability to utilize affirmative action measures to increase college participation and employment opportunities for women and minorities. American Council on Education, *Making the Case for Affirmative Action in Higher Education: What You Can Do to Safeguard Affirmative Action on Campus and in Your Community*

---

1. The pamphlet is intended to serve as a general resource for college and university attorneys, higher education administrators, and other interested members of the higher education community. It does not provide legal advice, however, and colleges and universities should consult legal counsel concerning particular minority-targeted admissions or financial aid programs. Although the general legal principles of affirmative action discussed in this pamphlet may extend beyond minority-targeted admissions and financial aid, the operation of those principles or other applicable law in the context of other student affairs programs, employment, contracting, or gender-based affirmative action programs is outside the scope of this pamphlet. Finally, this pamphlet focuses on federal law; colleges and universities must also consider whether accrediting agency standards, state law, or pending legislation may govern their programs.

15 (Feb. 1996), *see also* U.S. Department of Education, *Enrollment in Higher Education: Fall 1986 Through Fall 1994* (1996).

In a separate study of minority-targeted financial aid programs, the U.S. General Accounting Office ("GAO") confirmed the significance of minority-targeted scholarships to the student recipients and the colleges and universities they attend.[2] Specifically, institutional officials indicated that minority-targeted scholarships play an important role in the recruitment and retention of minority students by influencing enrollment decisions, particularly where the cost of attendance is high and minority students have a financial need; sending a message of institutional commitment to minority student enrollment and graduation; and assisting in the formation of a "critical mass" of minority students on campus.

Notwithstanding the important role of minority-targeted financial aid programs, the GAO study found that minority-targeted scholarships typically represent a very small portion of total financial aid available at colleges and universities. Minority-targeted scholarships were common, as approximately two-thirds of colleges, three-quarters of professional schools (principally law and medicine), and one-third of graduate schools offered this type of aid. Even so, such scholarships comprised no more than five percent of all undergraduate and graduate scholarships and scholarship monies, and about 10 percent of all scholarships and 14 percent of all scholarship monies at professional schools. At undergraduate schools, scholarships for which minority status was the only criterion were quite rare (roughly five percent of all minority-targeted scholarships).

THE ORIGINS OF AFFIRMATIVE ACTION PROGRAMS

Although the term "affirmative action" first came into use in the early 1960's, the concept of providing special consideration to minorities is not new. In 1866, the newly adopted Fourteenth Amendment to the U.S. Constitution prohibited states from denying individuals the "equal protection of the laws" and empowered Congress to implement that protection through specific legislation. Weeks later, Congress passed the Freedman's Bureau Act to establish programs for former slaves. *See* J. Jones, Jr., "The Genesis and Present Status of Affirmative Action in Employment: Economic, Legal, and Political Realities," 70 *Iowa L. Rev.* 901 (1985). The realities of segregation, economic inequality, and racial violence, however, largely obscured

2. U.S. General Accounting Office, *Higher Education: Information on Minority Targeted Scholarships* (1994); *see also* American Council on Education, *Minority Designated Scholarship Programs: A Compilation of Available Data on the Scope and Extent of Programs* (1991).

the impact of such government efforts. *See generally* K. O'Reilly, *Nixon's Piano* (1995). Indeed, the U.S. Supreme Court sanctioned racially separate public accommodations as a matter of constitutional law in *Plessy v. Ferguson*, 163 U.S. 537 (1896). The United States military remained racially segregated until World War II. Only in the early 1950's, in a series of cases culminating in *Brown v. Board of Education*, 349 U.S. 294 (1954), did the U.S. Supreme Court rule that racially separate public facilities were inherently unequal.

In 1961, President John F. Kennedy issued Executive Order 10,925, which prohibited discrimination in federal employment on the basis of race, religion, color, and national origin and required "affirmative steps" by federal agencies "to realize more fully the national policy of nondiscrimination." 3 C.F.R. 448, 449-50 (1959-1963 Comp.). The Order forbade federal contractors from discriminating on such grounds and mandated "affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin." *Id.*; *see also* Exec. Order 11,114, *id.* at 774.

The civil rights movement of the early 1960s resulted in passage of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, or national origin in federally assisted programs (Title VI) and employment (Title VII), among other areas. In 1965, President Johnson delegated to the Secretary of Labor responsibility for overseeing measures to assure nondiscrimination in employment "because of race, creed, color, or national origin," as well as "affirmative action" toward that end. Exec. Order 11,246, 3 C.F.R. 339, 340 (1964-65 Comp.).

From its origins in efforts to combat employment discrimination, "affirmative action" has extended beyond the federal government to state and local governments and private entities. At the federal level, the Office for Civil Rights ("OCR") of the U.S. Department of Education ("ED") has encouraged minority-targeted admissions and financial aid programs as part of compliance plans intended to dismantle previously segregated state systems of higher education. See *Adams v. Richardson*, 356 F. Supp. 92 (D.D.C. 1973), *modified*, 480 F.2d 1159 (D.C. Cir. 1973) (en banc). Similarly, federal regulations affecting educational programs and activities have for some years authorized voluntary affirmative action efforts. 34 C.F.R. § 100.3(b)(6)(ii) (1995). Some accrediting agencies also have adopted standards encouraging diversity in the student body and other aspects of higher education institutions.

ENFORCEMENT PROCEDURES

The proliferation of voluntary affirmative action programs and their heightened visibility has rendered them targets of agency review and litigation. Thus, in evaluating the legal risks associated with the operation of minority-targeted admissions and financial aid programs, colleges and universities should be familiar with the enforcement mechanisms and remedies available to redress perceived discrimination. Federal oversight agencies, notably OCR, may bring enforcement actions where an institution has programs or activities receiving federal financial assistance. Individuals aggrieved by such programs may also sue institutions for redress under various federal civil rights laws. The civil rights laws of most states also provide for enforcement and/or remedial relief.

OCR

Because OCR enforces Title VI and other federal civil rights laws that apply to recipients of federal financial assistance, nearly all colleges and universities fall within OCR's jurisdiction. OCR regulations implementing Title VI provide that, in administering a program that previously involved discrimination on the grounds of race, color, or national origin, a recipient of federal assistance must take affirmative or remedial action to overcome the effects of such discrimination. Even absent a finding of discrimination, a recipient "may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin." 34 C.F.R. §§ 100.3(b)(6)(i)-(ii) (1995).

After the U.S. Supreme Court's decision in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), OCR reexamined its Title VI regulations and issued a policy interpretation encouraging higher education institutions "to continue and expand voluntary affirmative action programs to increase their enrollment of minority group members and to attain a diverse student body." OCR Policy Interpretation of Title VI, 44 Fed. Reg. 58,509 (1979). OCR concluded that institutions could consider "race, color, or national origin as a positive factor, with other factors, such as geographic or economic circumstances, in selecting from among qualified candidates"; "[m]odify admissions criteria for minorities if it determines that it is necessary for a fair appraisal of the academic promise of minority applicants"; offer special services; and establish "numerical goals." *Id.* at 58,510-11. As discussed below, OCR recently confirmed its approval of minority-targeted scholarships as a "means to provide

equal educational opportunity and to provide a diverse educational environment for all students." 59 *Fed. Reg.* 8756 (1994).

In addition to issuing policy guidance, OCR investigates individual complaints and conducts compliance reviews. Upon receipt of a complaint, OCR generally seeks to resolve the differences between the complainant and the institution through a voluntary Early Complaint Resolution ("ECR") process, which concludes about ten percent of all cases. In the absence of a resolution through such means, OCR investigates the complaint and, where it believes the complaint has merit, seeks to resolve it through negotiated settlements involving corrective action. In cases that cannot otherwise be resolved, OCR has authority to initiate proceedings to terminate federal funds benefiting the program in which discrimination has been identified.

OCR uses compliance reviews principally to target issues it deems particularly significant or national in scope. It selects institutions based on various information sources, including complainants, interest groups, the media, the public, and survey data. Where it finds a violation following a compliance review, OCR attempts to negotiate corrective action before issuing a Letter of Finding ("LOF"). If OCR and the institution agree on corrective action, OCR issues a violation-corrected LOF. Where corrective action is not agreed upon, OCR may refer the matter to the Department of Justice. In all instances, OCR retains oversight authority over agreements entered into with institutions (for example, it monitors higher education desegregation plans in states that previously operated dual higher education systems).

Private Enforcement

In addition to the enforcement activities of government agencies, aggrieved individuals and entities can challenge college and university affirmative action programs under federal and many state civil rights laws. In some instances, such as Title VII of the Civil Rights Act of 1964, the statute provides a private right of action; that is, it expressly authorizes an aggrieved individual to sue the entity that engaged in the alleged discrimination. In other instances where the statute is silent, such as Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 (which prohibits gender discrimination by federal funds recipients), courts have permitted individuals to sue under an "implied" private right of action. *See, e.g., Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992) (Title IX); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (Title VI).

Although compliance with OCR guidelines may shield colleges and universities from OCR enforcement actions and provide a possible

defense against discrimination claims by private plaintiffs, it does not preclude private plaintiffs from suing colleges and universities to challenge their affirmative action measures, including those initiated as part of OCR compliance plans. *See Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) (petition for certiorari filed April 30, 1996); *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994), *amended*, 46 F.3d 5 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 2001 (1995). Although precedent is sparse, private plaintiffs have been somewhat less successful in challenging OCR's enforcement policies directly. *See, e.g., Washington Legal Foundation v. Alexander*, 778 F. Supp. 67 (D.D.C. 1991), *aff'd*, 984 F.2d 483 (D.C. Cir. 1993).

In cases challenging institutional affirmative action measures, plaintiffs may seek both injunctive relief and money damages. With respect to Title IX, the U.S. Supreme Court has ruled that damages are available only in cases of intentional discrimination. *See Franklin v. Gwinnett County Public Schools*, 503 U.S. at 75. Many observers believe that the rule enunciated in the *Gwinnett County* decision applies to closely analogous federal civil rights statutes, such as Title VI.[3]

LEGAL PRINCIPLES GOVERNING AFFIRMATIVE ACTION PROGRAMS

In reviewing a wide range of affirmative action programs over the past 35 years, courts have articulated increasingly strict standards that must be met for such measures to be sustained. If a general principle can be gleaned from this extensive body of law, it is that public and independent colleges and universities may take race into account in decision-making only (1) where ordered to do so by a court or other enforcement body or (2) in the case of voluntary measures, only where there is a permissible rationale for favoring a given minority group, and the race-conscious measure is demonstrably narrowly-tailored to meet that lawful purpose. Although the U.S. Supreme Court has not required that institutions await judicial, administrative, or legislative findings of past discrimination before adopting remedial measures, institutions generally must show a "strong basis in evidence" that race-conscious measures are warranted.

With respect to public colleges and universities, the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution generally protects similarly situated persons from unequal treatment

3. Special rules concerning money damages apply to private actions claiming employment discrimination under the Civil Rights Act of 1991. *See, e.g.*, 42 U.S.C. § 2000e-5(g)(1) (Supp. V 1993). Federal civil rights laws may also provide for recovery of a prevailing plaintiff's attorneys fees. *See, e.g.*, 42 U.S.C. § 2000e-5(g)(2)(B)(i) (Supp. V 1993).

by a state; thus, race-conscious measures by public institutions raise equal protection concerns. Public and private colleges and universities whose programs or activities receive federal financial assistance are subject to Title VI, prohibiting discrimination on the basis of race, color, or national origin. 42 U.S.C. § 2000d (1988). To date, the U.S. Supreme Court has interpreted the Equal Protection Clause and Title VI coextensively. *See, e.g., United States v. Fordice*, 505 U.S. 717 (1992); *Guardians Ass'n v. Civil Service Comm'n of the City of New York*, 463 U.S. 582 (1983). Thus, irrespective of the private or public status of the institution, the same legal principles may well apply to race-conscious admissions and financial aid programs.[4]

Under these various laws, courts subject racial classifications to the most stringent standard of judicial review — "strict scrutiny" — meaning that the classification must serve a "compelling interest" and be "narrowly-tailored" to the achievement of that objective. *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). The courts apply the same standard to race-based classifications, regardless of whether the motivation for the classification is benign or invidious, because of the difficulty in proving the intentions behind a race-based classification and in distinguishing benign and remedial classifications from those "motivated by illegitimate notions of racial inferiority or racial politics." *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. at 2112–13 (quoting *City of Richmond v. J. A. Croson Co.*, 486 U.S. at 493).

The U.S. Supreme Court has recognized only two objectives as constitutionally sufficient justification for race-conscious decision-making: (1) curing the present effects of identified past discrimination at the institution, and (2) fostering diversity. *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. at 486–93; *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (student admissions). Just as significantly, the Court has rejected a number of other proffered justifications for affirmative action measures: remedying societal discrimination; maintaining racial balance; increasing the number of minorities within a profession; increasing the number of professionals practicing in under-served areas; and providing faculty role models for students. *See Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986); *Regents of the University of California v. Bakke*, 438 U.S. at

4. Private colleges and universities and charitable foundations associated with public colleges and universities are also generally prohibited from discriminating on the basis of race by virtue of their tax-exempt status under the Internal Revenue Code. *See Bob Jones University v. United States*, 461 U.S. 574 (1983); IRS Rev. Proc. 75-50, 1975-2 C.B. 587; IRS Rev. Rul. 71-447, 1971-2 C.B. 230. The Internal Revenue Service has interpreted its nondiscrimination requirements in a manner consistent with federal civil rights laws.

265-315.[5] As to the types of affirmative action measures utilized by higher education institutions and other entities, the Court has looked more favorably on programs that (1) use flexible goals rather than rigid quotas; (2) do not significantly trammel rights of non-minorities; (3) are temporary; and (4) are initiated after race-neutral alternatives have been explored and found unworkable or inadequate. *See, e.g., Adarand Constructors, Inc. v. Pena*, 115 S. Ct. at 2117; *City of Richmond v. J.A. Croson Co.*, 488 U.S. at 507; *United States v. Paradise*, 480 U.S. 149 (1987).

Admissions

A major locus of college and university affirmative action efforts has been admissions offices. In keeping with general legal principles concerning voluntary affirmative action, colleges and universities must consider the purpose that consideration of race in admissions is intended to serve and the manner in which the institution takes race into account in the admissions process.

The Diversity Justification

Many colleges and universities have established race-conscious admissions programs to foster diversity in their student bodies. Judicial examination of such programs began with the 1978 decision of the U.S. Supreme Court in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). In *Bakke*, the Supreme Court struck down a medical school admissions program that set aside a specific number of places for "disadvantaged" minority students. Although a majority of Justices did not join any one opinion, Justice Powell authored the key opinion upholding diversity in the student body as a predicate for race-conscious admissions. Justice Powell reasoned that the liberty of colleges and universities to determine the composition of their student bodies was an aspect of academic freedom, "a special concern of the First Amendment." 438 U.S. at 312-13 (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

Justice Powell's concept of diversity led him to the conclusion that race could be only one positive consideration among others in the attainment of a diverse student body and the admission of individual applicants. He viewed diversity as a term to be broadly defined, explaining that "[t]he diversity that furthers a compelling state inter-

5. The U.S. Court of Appeals for the Third Circuit is currently considering a case involving a school district's layoff of a nonminority teacher and retention of an equally qualified minority teacher in order to foster faculty diversity. The lower court held that the school district's interest in faculty diversity did not justify the race-conscious layoff decision under Title VII. *United States v. Board of Educ. of the Township of Piscataway*, 832 F. Supp. 836 (D.N.J. 1993), *appeal pending* (Nos. 94-5080 and 94-5112), 1995 WL 704036 (3d Cir.).

est encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Id.* at 315. He noted with approval Harvard College's admissions program, under which race served as a "plus factor" along with other considerations in admission, such as exceptional personal talents, unique work or service experience, leadership potential, ability to communicate with the poor, or "other qualifications deemed important." *Id.* at 317. He intimated that the weighting of these considerations might vary from time to time. Finally, Justice Powell concluded that a college or university must evaluate all applicants in comparison to each other.

In the years since *Bakke* colleges and universities have sought to adhere to its principles, with varying results. A 1991 case illustrates the importance of a clear statement of the institutional reasons for adopting race-conscious admissions procedures or other affirmative action measures. In *Davis v. Halpern*, 768 F. Supp. 968 (E.D.N.Y. 1991), a white male who had unsuccessfully applied to the law school of the City University of New York ("CUNY") challenged CUNY's admissions policy. The federal district court observed that, absent prior discrimination by CUNY, consideration of race in admissions was constitutional only to the extent it sought to advance the educational benefits of a diverse student body. In the court's view, however, CUNY had not clearly articulated a diversity justification for its admissions policy, and the court therefore denied CUNY's motion for summary judgment.

Several recent, well-publicized OCR enforcement actions illustrate OCR's views on the lawfulness of race-conscious admissions procedures intended to foster student diversity. Although these OCR opinions are important indicators of the perspective of the federal agency responsible for enforcing Title VI, the courts are the final arbiters of the permissibility of such measures under Title VI.

In two of these instances, OCR found race-conscious admissions procedures unlawful under Title VI. In 1992, OCR entered into a conciliation agreement concerning the admissions plan of the University of California at Berkeley law school, which set percentage admissions targets for various racial and ethnic minorities. While recognizing student diversity as a lawful objective and admissions goals as a lawful means of achieving that objective, OCR found the admissions procedures invalid under Title VI because they failed to ensure comparison and competition between applicant groups and defined diversity in a manner that focused only on race and ethnicity.

Similarly, in 1993 the OCR Region I office reviewed the validity

under Title VI of the Minority Advancement Plan established by the Connecticut Board of Governors of Higher Education in 1986 pursuant to state law. The plan provided funds to recruit and retain students and faculty from groups under-represented in the state's colleges relative to their presence in the state population. Again recognizing the "importance and legitimacy" of the purpose to promote racial and ethnic diversity of students and staff in the state higher education system, OCR found that the plan unlawfully excluded Asian Americans and Native Americans by relying on statewide population data to identify groups underrepresented in the system as a whole. OCR concluded that the state should use relevant student availability data, such as state high school graduation rates, to determine which racial and ethnic groups were underrepresented in the state higher education system as a whole and at each individual state institution.

By contrast, OCR approved race-conscious admissions procedures at two University of California institutions as consistent with Title VI. In 1994, the Region IX office of OCR sustained a race-conscious admissions plan at the University of California at San Diego. The University first filled 60 percent of the openings using "traditional" admissions criteria, such as quantitative test scores. At this stage, only three percent of the students admitted were typically African-American, Hispanic, or Native American. During the second stage, the University added points based on classifications such as race, in-state status, low-income status, or status as a Veteran or disabled person. This process yielded 35 percent of the total acceptances; approximately 12 percent of applicants admitted at the second stage were from underrepresented ethnic groups. The University reserved the remaining five percent of offers of admission for economically disadvantaged applicants from all ethnic groups who did not qualify under criteria applied in the first or second stage, but who demonstrated adequate potential for success.

In March 1996, the OCR Region IX office ended a lengthy investigation of the University of California at Berkeley with a ruling that the undergraduate admissions program for the College of Letters and Science did not violate Title VI. OCR found that race served as only one factor in admissions and that all admitted students were highly qualified and assessed comparatively against rigorous admissions standards. OCR also determined that the program employed neither quotas nor set-asides, but only flexible goals. The program was revised from time to time to eliminate affirmative consideration given to a particular ethnic group when no longer necessary to achieve

diversity. The impact of the program on nonminority applicants was limited because students eligible to attend the University of California but denied admission to the Berkeley campus were admitted to another University of California campus and could reapply to Berkeley at a later date.

Concurrently with OCR's Title VI enforcement activities, the courts have considered whether a race-conscious admissions program intended, among other purposes, to foster student diversity is valid under the Equal Protection Clause of the U.S. Constitution. In *Hopwood v. Texas*, 861 F. Supp. 551 (W.D. Tex. 1994), *reversed in part and remanded*, 78 F.3d 932 (5th Cir. 1996) (petition for certiorari filed April 30, 1996), a case involving the University of Texas law school, a federal district court approved as legally valid two objectives underlying the law school's race-conscious admissions program: diversifying its student body and overcoming the present effects of past discrimination. Extensive testimony of law school deans, professors, and students established as an evidentiary matter that a diverse student body created educational benefits; in addition, the court found that, as part of a state educational system with a history of legal segregation, the law school continued to bear the present effects of past discrimination. The court nonetheless rejected several other proffered justifications for the admissions program, such as educating future leaders of the bench and bar; meeting the mandates of an OCR compliance plan that required increased efforts to recruit Mexican-Americans and African-Americans; and complying with accreditation standards regarding student body diversity.

Having identified two supportable rationales for the admissions program, the district court examined the means employed to achieve those objectives. The law school had instituted percentage admissions targets for Mexican-American and African-American applicants, and relative to such targets employed race-conscious procedures by (1) having a subcommittee review the files of those applicants separately from the files of other candidates (and then making essentially final admissions recommendations as to those applicants); and (2) applying a lower quantitative standard in screening applications of the targeted groups. The district court concluded that, in almost all aspects, the admissions procedures operated permissibly; admissions goals were set correctly relative to the percentage of Mexican-American and African-American college graduates in Texas; the goals were flexible, influenced by the variable quality of the applicant pool, and admissions standards were raised as the quality of the minority applicant pool improved; and the school did not intend to employ the

goals indefinitely. Ultimately, however, the federal district court disapproved the program on the ground that its use of a bifurcated applications review process failed to subject all applicants to competitive review.

On appeal, a three-judge panel of the U.S. Court of Appeals for the Fifth Circuit held that the law school's consideration of race as a factor in its admissions decisions violated the Equal Protection Clause of the U.S. Constitution. Two judges rejected diversity as a constitutionally sustainable basis for the use of such preferences in any circumstances. The third judge, concurring in the result, assumed that diversity remained a constitutional rationale, but concluded that the admissions process was nevertheless unconstitutional because it gave preference only to Mexican-American Hispanics and African-Americans. All three judges agreed that the law school had failed to demonstrate that affirmative action was necessary to overcome the present effects of past discrimination, due to inadequate evidence that such effects related to the law school's own actions and circumstances, rather than to those of the Texas educational system or society as a whole. The Fifth Circuit thus reversed the lower court judgment and remanded the case for reconsideration of damages, upholding the denial of punitive damages upon finding that the law school had acted in good faith. The court also declined to issue an injunction directing the law school to change its admissions processes, expressing confidence that the law school would respond appropriately to its ruling.

The Fifth Circuit's interpretation of the Equal Protection Clause in *Hopwood* applies to public colleges and universities (and may affect private colleges and universities under Title VI) in states under the jurisdiction of the Fifth Circuit: Texas, Mississippi and Louisiana. The State of Texas has petitioned the U.S. Supreme Court to review the Fifth Circuit's decision and has been granted a stay of the Fifth Circuit's order pending the Supreme Court's review. *Hopwood v. Texas*, Nos. 94-50569 & 94-50664 (5th Cir. April 19, 1996). If the Supreme Court declines to review the *Hopwood* decision, the Fifth Circuit decision will be binding on institutions only within its jurisdiction as noted above.

At this time, it remains uncertain whether the U.S. Supreme Court will continue to recognize diversity as an interest sufficiently compelling to sustain racial preferences against Constitutional and Title VI challenges — an issue the *Hopwood* appeal may address. Although some observers have questioned the continuing precedential

force of *Bakke* after *Adarand*,[6] others maintain that *Bakke* remains good law.[7] It is difficult to predict what approach the Court will take toward *Bakke* in the future, particularly in light of its recent rulings in desegregation and voting rights cases. *See Miller v. Johnson*, 115 S. Ct. 2475 (1995); *United States v. Hays*, 115 S. Ct. 2431 (1995); *Missouri v. Jenkins*, 115 S. Ct. 2038 (1995). In the meantime, colleges and universities operating race-conscious admissions and financial aid programs to foster diversity in the student body should be prepared to articulate persuasively why diversity is educationally important and why race-conscious measures are necessary to achieve diversity.

The Past Discrimination Justification

A number of colleges and universities have adopted race-conscious admissions policies as a means of overcoming the present effects of past discrimination. In some instances, past discrimination has been proven through adjudication or conceded in court proceedings, agency investigations, or legislative hearings, or may be apparent from a history of legal segregation in the state. Institutions without such findings of past discrimination must show "a strong basis in evidence" for concluding that remedial steps are necessary.

Courts have approved race-based student admissions goals as part of a court-ordered effort to cure the present effects of past discrimination in a state system of higher education. In *Geier v. Alexander*, 801 F.2d 799 (6th Cir. 1986), for example, the court upheld race-conscious admissions goals that it concluded were "narrowly-tailored" to eliminate vestiges of past segregation in Tennessee public colleges, characterizing the goals as limited in duration, flexible, and based on the proper available pool of student applicants. The court noted that alternative, less intrusive measures had failed. Similarly, in *United States v. Fordice*, 505 U.S. 717 (1992), the U.S. Supreme Court required the state to consider race-based remedial measures necessary to ameliorate present effects of past segregation in Mississippi higher education institutions.

---

6. The Court cited *Bakke* with approval in *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990), which upheld policies of the Federal Communications Commission intended to foster diversity in the broadcast industry. In *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995), a case involving a federal construction program providing incentives for subcontracting with disadvantaged minority businesses, the Court expressly overruled *Metro Broadcasting* to the extent that that decision had approved a standard of judicial review less than "strict scrutiny" for federal affirmative action programs.

7. *See, e.g., Wygant v. Jackson Board of Education*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring) ("[D]iversity has been found sufficiently 'compelling', at least in the context of higher education, to support the use of racial considerations in furthering that interest"); *Hopwood v. Texas*, Nos. 94-50569 & 94-50664, slip op. at 6 & n.11 (5th Cir. April 23, 1996) (Jolitz, Chief Judge, and King, Wiener, Benavides, Stewart, Parker, and Dennis, Circuit Judges, dissenting from failure to grant rehearing en banc) ("Lest there be any doubt, we are firmly convinced that, until the Supreme Court expressly overrules *Bakke*, student body diversity is a compelling governmental interest for the purposes of strict scrutiny.") (emphasis in original).

In the context of voluntary, race-conscious admissions plans, judicial decisions to date have not provided clear guidance as to what facts constitute a "strong basis in evidence" sufficient to support remedial measures by colleges and universities. In *Hopwood*, the Fifth Circuit concluded that the University of Texas law school had failed to demonstrate that its race-conscious admissions program addressed present effects of past discrimination. Past discrimination unquestionably existed, as the law school was part of a state educational system with a history of legal segregation. Moreover, the law school was operating under an OCR-mandated compliance plan favorably targeting Mexican-American and African-American applicants. The court, however, rejected evidence of the law school's reputation in the minority community and perception of the school as a hostile environment for minorities as means of demonstrating present effects of past discrimination by the law school. Citing the *Podberesky* decision, the court also declined to accept the law school's argument that underrepresentation of minorities in the student body constituted a "present effect," again concluding that the law school failed to demonstrate that its own discriminatory acts caused that result.

In *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994), *amended*, 46 F.3d 5 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 2001 (1995), a case involving minority-targeted scholarships, the U.S. Court of Appeals for the Fourth Circuit concluded for similar reasons that the University of Maryland at College Park had not shown "a strong basis in evidence" for remedial action. The facts in *Podberesky* are discussed further below.

Minority-Targeted Scholarships

As the GAO study indicates, minority-targeted scholarship programs are common at colleges and universities, although their design varies from institution to institution. As with race-conscious admissions procedures, some colleges and universities have adopted minority-targeted scholarship programs as part of an effort to overcome a history of discrimination. More often, such programs are designed to foster diversity in the student body. To enhance the legal viability of such programs, colleges and universities should consider both their purpose and their structure in light of evolving legal standards.

OCR Policy

For many years after *Bakke*, OCR generally adhered to the position that, under Title VI, colleges and universities may take race into account to a greater degree in financial aid awards than in the admis-

sions process. OCR reasoned that the set-aside of places for minority students could prevent non-minority students from attending the institution, whereas race-exclusive financial aid programs neither barred non-minority students from attendance nor unduly burdened them financially, as long as the minority-targeted aid represented a small portion of the institution's overall financial aid resources.

The status of this long-standing administrative interpretation was placed in doubt between 1990 and 1992 when, during the politically charged "Fiesta Bowl" controversy, OCR asserted that at most race could be a "plus factor" in the award of financial aid. After public outcry, ED suspended the more restrictive approach and, in February 1994, following publication of the GAO study, issued a Final Policy Guidance that reaffirmed and elaborated its original position. 59 Fed. Reg. 8756 (1994). The Final Policy Guidance is a statement of enforcement approach without the force of positive law and has not yet received judicial review. Although courts may accord the Final Policy Guidance some deference as an interpretation of Title VI by the agency responsible for its enforcement, *see Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the extent of any such deference in a case involving a constitutional challenge cannot be predicted with certainty.

The Final Policy Guidance confirms that minority-targeted scholarships may be a lawful means of promoting minority student access to higher education and identifies the circumstances in which ED views such programs as in compliance with Title VI. Specifically, the Final Policy Guidance approves minority-targeted financial aid in five situations:

(1) Race-neutral programs: where the institution distributes financial aid according to race-neutral criteria, such as socio-economic disadvantage, even though the application of such criteria may disproportionately benefit minority students.

(2) Federal programs: where the institution awards aid pursuant to a federal minority-targeted financial aid program authorized by Congress. The implications for this principle of the U.S. Supreme Court's recent decision in *Adarand* are discussed further below.

(3) Programs to remedy past discrimination: where the institution awards minority-targeted financial aid as part of an effort to remedy the present effects of identified past discrimination by the institution. The Final Policy Guidance states that minority-targeted financial aid may result from findings of past discrimination by a court, administrative agency, or legislature, but that institutions need not await such findings as long as they have a "strong basis in evidence" for

taking affirmative action. According to the Final Policy Guidance, a "strong basis in evidence" may include anecdotal as well as statistical evidence of discrimination. With respect to statistical evidence, the facts apparently must demonstrate a statistically significant disparity between the percentage of minority students enrolled at the institution and the percentage of qualified minorities in the relevant pool of college-bound high school graduates. The decisions of the U.S. Court of Appeals for the Fourth Circuit in *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994), *amended*, 46 F.3d 5 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 2001 (1995), and the U.S. Court of Appeals for the Fifth Circuit in *Hopwood v. University of Texas*, 78 F.3d 932 (5th Cir. 1996) (petition for certiorari filed April 30, 1996), and their possible implications for this principle are discussed below.

(4) Programs to foster diversity: where the institution awards minority-targeted financial aid in order to promote diversity in the student body. The Final Policy Guidance states that ED will accept the use of race as a "plus factor" in minority-targeted scholarship programs intended to foster diversity. In addition, ED may approve race-exclusive scholarships as "narrowly-tailored" to achieve diversity if (i) race-neutral means of achieving diversity have been or would be ineffective; (ii) a less extensive or intensive use of race or national origin has been or would be ineffective; (iii) the use of race or national origin is limited in extent and duration and is applied in a flexible manner; (iv) the policy is periodically reviewed; and (v) the effect on students who are not beneficiaries is sufficiently small and diffuse so as not to create an undue burden on their opportunity to receive financial aid. The decision of the U.S. Court of Appeals for the Fifth Circuit in H*opwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) (petition for certiorari filed April 30, 1996), and its possible implications for this principle are discussed below.

(5) Private gifts: where the institution accepts a private gift restricted to minority-targeted scholarships, as long as the institution's administration of the fund otherwise conforms to legal requirements, including a permissible justification and lawful means.

Whether a minority-targeted financial aid program is intended to overcome past discrimination or to foster student diversity, the Final Policy Guidance notes that the structure of the program must be narrowly tailored to meet the stated objective. To this end, the Final Policy Guidance identifies various considerations for determining whether a program is narrowly tailored, including whether race-neutral means are unavailable or inefficacious; whether a less burdensome use of race in awarding aid would be ineffective; whether the

use of race as a criterion is intended to be limited in duration, applied flexibly, and periodically reassessed; and how the program affects non-minority students.

The Final Policy Guidance also contains special provisions concerning the award of minority-targeted financial aid by historically black colleges and universities ("HBCUs"). Under the Final Policy Guidance, HBCUs may participate in student aid programs "established by third parties that target financial aid to black students, if those programs are not limited to students" at the HBCUs. 59 Fed. Reg. at 8758. HBCUs may use their own institutional funds to participate in these programs. *Id.*

The Final Policy Guidance became effective on May 24, 1994. It contains a two-year transition period for institutions to comply with its principles, and "grandfathers" in certain minority-targeted financial aid awards. *Id.*

Judicial Review

Although many institutions will find the Final Policy Guidance a valuable resource in considering the lawfulness of their minority-targeted scholarship programs,[8] under Title VI and the Constitution, courts are the final arbiter of the legality of such programs. Because of the absence of a definitive decision by the U.S. Supreme Court and the developing body of case law precedent, it is difficult to predict the judicial outcome in the event of a program challenge.

(1) Race-neutral programs. To date, the courts have not ruled directly on scholarship programs based on race-neutral criteria that disproportionately benefit minority students.[9] If the absence of a racial classification results in applying a standard of judicial review that is less onerous than strict scrutiny, a race-neutral program would be more readily defensible against a legal challenge than one using race-conscious criteria.

(2) Federal programs. Federal minority-targeted financial aid programs are now under review as a result of the Supreme Court's recent decision in *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995). Following the ruling that the strict scrutiny standard of review applies to federal affirmative action initiatives, President Clinton directed federal agencies to evaluate their affirmative action pro-

8. ED reaffirmed the Final Policy Guidance in the wake of *Adarand* and *Podberesky*. Letter from J. Winston, General Counsel of ED, to College and University Counsel (Sept. 7, 1995).

9. Courts have addressed the lawfulness under Title VII of facially neutral criteria that disproportionately affect a particular group, especially in the context of sex discrimination in employment. *See, e.g., International Union v. Johnson Controls, Inc.*, 499 U.S. 187 (1991); *Hendley v. Southwood Psychiatric Hospital*, 78 F.3d 128 (3d Cir. 1996). The law is less well developed under Title VI. *See, e.g., Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582 (1983); *Lau v. Nichols*, 414 U.S. 563 (1974).

grams. *See Affirmative Action Review: Report to the President* (July 19, 1995).

(3) Programs to remedy past discrimination. Minority-targeted scholarships intended to overcome past discrimination have met with mixed results in the courts. In states that had legally segregated systems of public higher education, minority-targeted scholarship programs have been employed as a component of court-approved desegregation plans, including other-race scholarships at historically black institutions. *See, e.g., Knight v. Alabama*, 14 F.3d 1534 (11th Cir. 1994).

By contrast, in *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994), *amended*, 46 F.3d 5 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 2001 (1995), the U.S. Court of Appeals for the Fourth Circuit held unconstitutional a voluntary minority-targeted scholarship program intended to overcome the present effects of past discrimination. The University of Maryland initially adopted the scholarship program as part of an OCR compliance plan to overcome the history of legal segregation in public higher education in the state. An Hispanic student challenged his ineligibility for the scholarship, which was restricted to high-achieving African-American students. The district court held that the program satisfied the strict scrutiny standard. 764 F. Supp. 364 (D. Md. 1991). The Fourth Circuit reversed, finding insufficient proof of present effects of past discrimination, and remanded the case to the district court. 956 F.2d 52 (4th Cir. 1992).

The University then conducted an extensive administrative fact-gathering process, holding public hearings, receiving submissions, and commissioning studies. Ultimately, the University issued a lengthy report that identified four lingering effects of past discrimination, including a poor reputation in the African-American community, a racially hostile campus climate, under-representation of African-American students, and disproportionately low retention and graduation rates for African-American students. The district court approved the report's major conclusions and sustained the program. 838 F. Supp. 1075 (D. Md. 1993).

On the second appeal, the Fourth Circuit ruled that the University had not presented "a strong basis in evidence" for the scholarship program. The court reasoned that evidence of poor reputation and hostile climate were not sufficient to justify the race-exclusive scholarship program, as reputation might reflect "mere knowledge of historical facts" and hostile climate could be attributable to general societal conditions rather than circumstances specific to the campus. Criticizing the manner in which the University had conducted its

statistical analysis of enrollment patterns, the court concluded that the University had also failed to prove that either under-enrollment of minorities or differential graduation rates between minority and non-minority students were causally linked to past discrimination. The U.S. Supreme Court declined to review this decision, letting the ruling stand as the law within the Fourth Circuit (which encompasses Maryland, Virginia, West Virginia, and North and South Carolina).

Similarly, in the *Hopwood* case discussed above, the Fifth Circuit rejected evidence like that offered in *Podberesky* as insufficient to show present effects of past discrimination. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) (petition for certiorari filed April 30, 1996).

(4) Programs to foster diversity. No reported court decision appears to have directly examined the legality of a minority-targeted scholarship program intended to foster student diversity. Until recently, legal controversy surrounding such programs related less to the propriety of the objective than to the permissible means — in particular, whether race may be a requirement for eligibility for scholarship awards. As discussed above, in the wake of *Adarand*, the Fifth Circuit ruled as a matter of constitutional law that diversity is not a compelling interest supporting the use of race-conscious decisionmaking in admissions. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) (petition for certiorari filed April 30, 1996). The U.S. Supreme Court may consider the continuing validity of diversity as a basis for race-conscious decision-making by colleges and universities if it agrees to hear the *Hopwood* appeal.

(5) Private gifts. The courts do not appear to have addressed whether a college or university is subject to a different legal standard in administering minority-targeted financial aid from private sources than in administering institutional aid. The Civil Rights Restoration Act made "all of the operations" of an institution receiving federal assistance subject to the requirements of Title VI. 42 U.S.C. § 2000d-4a (1988). The Final Policy Guidance adheres to this statutory requirement in applying uniform legal standards to minority-targeted financial aid, whether supported by private funds or institutional funds.

Court rulings confirm that minority-targeted scholarship programs must be "narrowly-tailored" to achieve their objectives. Prior to *Bakke*, a federal district court ruled unlawful, under Title VI, a program that allocated 60 percent of financial aid to first-year minority students, who constituted 11 percent of the class. *Flanagan v. President and Directors of Georgetown College*, 417 F. Supp. 377 (D.D.C. 1976). Although the case does not elaborate on the intended purpose of this program, the court appears to have viewed this pro-

gram as inappropriately restricting needy non-minority students' access to financial aid.

More recently, in *Podberesky*, the Fourth Circuit concluded as a matter of constitutional law that a scholarship program offered to high-achieving African-American students was not narrowly tailored to overcoming the past segregation of Maryland higher education. Because the University had not, in the court's opinion, used appropriate methodology in setting its enrollment goals for minority students, the court viewed the program as establishing a racial quota. The court also stated that the high-achieving African-American students who received the scholarships did not represent a category of persons who had historically suffered discrimination. Finally, the court commented that, insofar as the University awarded scholarships to African-American students from other states, the program exceeded its necessary scope by benefiting persons outside the category it purported to redress.

CONCLUSION

Relative to voluntary minority-targeted admissions and financial aid programs, it appears that a college or university may not set aside places or establish quotas for minority students in the interest of developing a diverse student body or remedying past discrimination. Colleges and universities should also assume that the strict scrutiny standard will be applied in analyzing the legality of such programs, whether under the U.S. Constitution or Title VI.

The gradual evolution of the law nonetheless makes it difficult to offer definitive guidance for colleges and universities designing and operating such programs. Until the Supreme Court clarifies the law concerning such programs nationally, institutions must consider the interpretations of the law announced by the courts in their respective federal circuits. Institutions in states within the jurisdiction of the Fifth Circuit, for example, should consult with counsel concerning the special risk management issues that affect their continued operation of minority-targeted admissions and financial aid programs pending consideration of the *Hopwood* decision by the Supreme Court.

In the absence of such rulings, although outer boundaries can be identified, program decisions must rest ultimately upon the institution's evaluation of the importance of such a program in view of its policy directives, its assessment of legal exposure, and the relative cost-effectiveness of specific program features as measured against their legal risk. In assessing where a given program falls on the

spectrum of legal risk, an institution might consider questions such as the following:

With respect to the purpose of the program:

(1) Has the institution identified a legally permissible purpose for the program? The U.S. Supreme Court has thus far approved only two program rationales: overcoming past discrimination and fostering student body diversity. Other stated objectives have either been disapproved or not yet addressed by the courts. In *Hopwood*, the Fifth Circuit discounted the diversity justification on the grounds that its source (Justice Powell's concurrence in *Bakke*) lacked the endorsement of a Supreme Court majority and Supreme Court decisions subsequent to *Bakke* had failed to sustain it.

(2) Has the institution clearly articulated the purpose that the program is intended to serve? As *Davis v. Halpern* demonstrates, an institution may have difficulty defending a program with an ambiguous objective.

(3) What quantity and quality of evidence does the institution have to support the stated purpose of the program? At least with respect to overcoming past discrimination, the Supreme Court has required that the institution have "a strong basis in evidence" for voluntary affirmative action measures. To date, universities have found this standard difficult to meet. In both *Hopwood* and *Podberesky*, the defendant universities were part of previously segregated state educational systems; thus, the examination focused primarily on "present effects" of undebatable past discrimination. Neither federal appeals court found an adequate linkage between the "effects" introduced into evidence and actions or circumstances attributable to the respective campuses.

Institutions basing race-conscious admissions and financial aid programs on efforts to overcome past discrimination, thus, should consider carefully the availability and probative value of statistical and other evidence of the present effects of past discrimination. As noted above, such evidence might include statistically significant disparities between the percentage of minority students enrolled at the institution and the percentage of qualified minorities in the relevant pool of college-bound high school graduates, evidence that the institution has been a "passive participant" in discriminatory practices by others, and other evidence recognized by the courts. *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

While universities have had some success in establishing the educational benefits of a diverse student body, institutions operating race-conscious admission and financial aid programs in order to

further diversity should also consider the evidentiary basis for their programs, particularly support for the educational value of diversity and the need for race-conscious measures to achieve it. Unless reversed by the Supreme Court, the Fifth Circuit's decision in *Hopwood* would make such evidentiary questions irrelevant to institutions within its jurisdiction because diversity would no longer constitute a constitutionally valid predicate for race-conscious measures.

With respect to the structure of the program:

(1) Has the institution tried or considered race-neutral alternatives? Although an institution need not necessarily exhaust all race-neutral alternatives before adopting race-conscious measures or choose the least burdensome means of accomplishing its objectives, the institution may reduce its legal risk by expressly considering whether race-neutral approaches would meet such objectives efficaciously. The Fifth Circuit's decision in *Hopwood* would prohibit the use of race as a consideration in admissions decisions in order to foster student diversity; thus, only racially neutral criteria, such as socio-economic disadvantage, could influence such admissions decisions.

(2) What minority group or groups does the program benefit? Outside the higher education context, courts and agencies have disapproved programs benefiting a particular minority group where the institution failed to show any past discrimination or its present effects with respect to that group. These rulings, however, may be less forceful in the context of race-conscious admissions and financial aid programs at higher education institutions, particularly those intended to foster student diversity.

(3) How is race taken into account? A program in which race is one consideration among many carries substantially less legal risk than a program in which race is a criterion for eligibility. The Fifth Circuit's decision in *Hopwood* would categorically preclude consideration of race in programs intended to further diversity in the student body.

(4) If the program employs numerical goals, how have they been set? Except as part of a court-ordered remedy, quotas and set-asides are legally impermissible. In addition, an institution will have difficulty defending arbitrary or unconvincingly developed numerical goals. As suggested in *Podberesky* and in ED's Final Policy Guidance, one potentially viable approach is to develop goals established through a comparison between the percentage of minority students enrolled and the percentage of minority students in the appropriately identified pool of qualified, college-bound high school graduates. *See also* A. Baida, "Not All Minority Scholarships Are Created Equal: Why Some

May Be More Constitutional Than Others," 18 *J. C. & U. L.* 333 (1992); A. Baida, "Not All Minority Scholarships Are Created Equal, Part II: How to Develop a Record That Passes Constitutional Scrutiny," 21 *J. C. & U. L.* 307 (1994).

(5) Are the goals administered in a strict or flexible manner? Courts are likely to view flexibly administered goals more favorably than rigid quotas.

(6) What impact does the program have on non-minorities? An institution is more likely to defend a program successfully if the impact on non-minorities is limited or diffused, such as where the funds allocated to "diversity" scholarship programs constitute a comparatively minimal amount of funds generally available. In this regard, courts and agencies may scrutinize admissions decisions more skeptically than scholarship awards because racial preferences in admissions may have greater impact on non-minorities' educational opportunities than minority-targeted financial aid. Although that long-recognized distinction may be challenged in this era of declining affordability of higher education, the Fifth Circuit decision in *Hopwood* would likely affect consideration of race relative to scholarship awards, as well as admissions decisions, intended to foster student diversity at universities in the Fifth Circuit.

(7) How long is the program intended to last? Programs that are limited in duration and periodically reviewed with respect to continuing utility and effectiveness present less risk in the current legal context than programs that continue indefinitely without reevaluation.

The law concerning minority-targeted admissions and financial aid, as well as affirmative action programs generally, is continuing to evolve. Most notably, a U.S. Supreme Court ruling on the merits of the *Hopwood* appeal could resolve questions regarding the legal status of diversity as a basis for race-conscious admissions and scholarship decisions. With respect to initiatives designed to overcome present effects of past discrimination — most particularly those linked to federal programs and requirements — the impact of *Adarand* remains to be seen. It is important that colleges and universities operating such programs monitor legal developments closely and reevaluate programs regularly in light of further clarifications and trends in the law.

Selected Bibliography

American Council on Education, *Making the Case for Affirmative Action in Higher Education: What You Can Do to Safeguard Affirmative Action on Your Campus and in Your Community* (Feb. 1996).

Andrew Baida, "Not All Minority Scholarships Are Created Equal: Why Some May Be More Constitutional Than Others," 18 *Journal of College and University Law* 333 (1992).

Andrew Baida, "Not All Minority Scholarships Are Created Equal, Part II: How to Develop a Record That Passes Constitutional Scrutiny," 21 *Journal of College and University Law* 307 (1994).

Barbara L. Bergman, *In Defense of Affirmative Action* (1996).

Paul Brest and Miranda Oshinge, "Affirmative Action for Whom?," 47 *Stanford Law Review* 855 (1995).

Deborah J. Carter and Reginald Wilson, *Minorities in Higher Education, Fourteenth Annual Report*, American Council on Education (1995).

Stephen L. Carter, *Reflections of an Affirmative Action Baby* (1991).

Richard Delgado, "Rodrigo's Tenth Chronicle: Merit and Affirmative Action," 83 *Georgetown Law Journal* 1711 (1995).

Terry Eastland, *Ending Affirmative Action — The Case for Colorblind Justice* (1996).

John Hart Ely, "The Constitutionality of Reverse Racial Discrimination," 41 *University of Chicago Law Review* 723 (1974).

Daniel A. Farber, "The Outmoded Debate Over Affirmative Action," 82 *California Law Review* 893 (1994).

Jean H. Fetter, *Questions and Admissions: Reflections on 100,000 Admissions Decisions at Stanford* (1995).

Leslie Yalof Garfield, "Squaring Affirmative Action Admissions Policies With Federal Judicial Guidelines: A Model for the Twenty-First Century," 22 *Journal of College and University Law* 895 (1996).

Andrew Hacker, "Diversity and its Dangers," *The New York Review of Books*, October 7, 1993, at 21.

Andrew Hacker, *Two Nations: Black and White, Separate, Hostile, Unequal* (1992).

Michael Kinsley, "The Spoils of Victimhood — The Case Against the Case Against Affirmative Action," *The New Yorker*, March 27, 1995, at 62.

Nicholas Lemann, "Taking Affirmative Action Apart," *The New York Times Magazine*, June 11, 1995, at 36.

Glen C. Loury, *One by One from the Inside Out* (1995).

Douglas S. Massey and Nancy A. Denton, *American Apartheid, Segregation, and the Making of the Underclass* (1993).

Nicolaus Mills, ed., *Debating Affirmative Action: Race, Gender, Ethnicity, and the Politics of Inclusion* (1994).

Don Munro, "The Continuing Evolution of Affirmative Action Under Title VII: New Directions After the Civil Rights Act of 1991," 81 *University of Virginia Law Review* 565 (1995).

Paul Craig Roberts and Lawrence M. Stratton, *The New Color Line: How Quotas and Privilege Destroy Democracy* (1995).

Neil Rudenstine, The President's Report: "Diversity and Learning" (Jan. 1996) (available on-line at http://www.harvard.edu.presidents_office), reprinted in part in *Harvard Magazine* 48 (March-April 1996).

Paul M. Sniderman and Thomas Piazza, *The Scar of Race* (1993).

Thomas Sowell, *Preferential Policies: An International Perspective* (1990).

Shelby Steele, *The Content of our Character: Race in America* (1995).

Kathleen M. Sullivan, "Sins of Discrimination: Last Term's Affirmative Action Cases," 100 *Harvard Law Review* 78 (1986).

Cornel West, *Race Matters* (1994).

Roger Wilkins, "The Case for Affirmative Action — Racism has its Privileges," *The Nation*, March 27, 1995, at 409.

27

Also Available from NACUA

Pamphlets/Monographs

The Permissibility of Withholding Transcripts Under Bankruptcy. *$4.50*
The Family Medical Leave Act of 1993: Applications in Higher Education. *$6.50*
A Guide to Copyright Issues in Higher Education. *$6.50*
Access to Institutions of Higher Education for Students with Disabilities. *$6.50*
Looking a Gift Horse in the Mouth. *$6.50*
Acquaintance Rape on Campus: A Model for Institutional Response. *$12.50*
Managing Federal Student Financial Aid Programs. *$9.50*
Responding to Whistleblowers. *$6.50*
What to Do When OSHA Comes Calling. *$6.50*
Crime on Campus. *$9.50*
Risky Business: Risk Management, Loss Prevention and Insurance Procurement. *$6.50*
The Dismissal of Students with Mental Disorders. *$6.50*
Defamation Issues in Higher Education. *$6.50*
Peer Review Confidentiality: Is It Still Possible? *$6.50*
Technology Transfer and Risk Management. *$6.50*
Complying with "Drug-Free Workplace" Laws. *$6.50*

Compendia

Accommodating Students with Learning and Emotional Disabilities. *$42.50*
Employment Issues in Higher Education. *$37.50*
A Practical Guide to Title IX: Law, Principles, and Practices. *$42.50*
Student Disciplinary Issues. *$37.50*
AIDS on Campus. *$25.00*
Intellectual Property in Academe. *$22.00*
Academic Program Closures. *$29.50*
Sexual Harassment on Campus. *$22.00*
Regulating Racial Harassment on Campus. *$22.00*
Practical Aspects of Technology Transfer. *$22.00*
College and University Student Records. *$22.00*
Am I Liable? *$25.00*
Legal Issues in Faculty Employment. *$22.00*
Student Legal Issues. *$20.00*
Legal Issues in Athletics. *$22.00*
Instructional Supplement to *The Law of Higher Education*. *$45.00*

To receive a NACUA Publications Brochure with detailed descriptions of the resources listed above, or to place an order, write to NACUA Publications, One Dupont Circle, Suite 620, Washington, D.C. 20036 or E-mail: nacua@nacua.org
PREPAID ORDERS ONLY.

National Association of College
and University Attorneys
One Dupont Circle, N.W.
Suite 620
Washington, D.C. 20036
202-833-8390

BEST COPY AVAILABLE